No. 476

IN THE

Supreme Court of the United States

October Term, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, AND M. W. MILLER, TRUSTEE, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This reply is filed in behalf of Local Union 968 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and M. W. Miller, its Trustee, these being all the Respondents below.

Opinion Below

The opinion of the court below (Appendix A of Petition) is reported at 225 F. 2d 205. The findings of fact, conclusions of law, and order of the Board (R. 50-61) are reported at 109 NLRB 275.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

The 4 strikers were truck driver-warehousemen who worked at their employer's warehouse and also delivered the employer's insulation and other building materials to various construction jobs for installation by other employees of the same employer. This installation of its materials through its own employees was 70% or more of the employer's business. When collective bargaining failed between the employer and Respondent Local 968, as the certified bargaining representative of the 4 employees, they struck and picketed at both ends of their to and fro trucking operations. The unchallenged conclusion of the Court of Appeals, from a review of the whole record, was that the picketing at the construction jobs was directed to, and limited to, the other employees of the same employer appealing to them to make common cause pursuant to their right of concerted activity under Section 7 of the Act. The Board does not claim that there is evidence of an additional objective to appeal to or induce employees of neutral employers to take any action.

The question presented is whether, in the face of this record, the Board could properly declare that the "situs" of the dispute was the warehouse only, at which situs the

picketing was "adequate", and by this criterion, find the picketing at the job sites to be in violation of 8(b)(4)(A) of the Act.

Statutes Involved

In addition to Section 8(b)(4)(A) (set forth in Appendix B of the Petition), Sections 7 and 13 of the Act, 29 U.S.C.A. 157 and 163 (set forth in Appendix A, *infra*, p. 15) are also pertinent to this case.

Statement

In the court below Respondents, invoking both Section 10(e) of the Act,[1] and Section 10(e) of the Administrative Procedure Act,[2] sharply attacked the Board's order and findings on the ground that they are: (1) unsupported by substantial evidence, and (2) contrary to an impressive and convincing record that the challenged picketing had lawful purpose to avail of a statutory right.

Reviewing the entire record, the Court of Appeals concluded: (1) that the record "is significantly devoid of any probative proof in support of the allegation in the complaint that Respondent by 'picketing, * * * orders, instructions, directions, appeals and other means' induced and encouraged employees of neutral employers to strike with unlawful secondary object * * * *" (Appendix A of Petition, p. 28); and (2) "the picketing here enjoined was aimed only at the primary employer * * * *" and "* * * even under the Board's own evidence that concerted activity was solely for the lawful object of picketing only Otis Massey * * * *" (Appendix A of Petition, p. 28).

[1] 29 U. S. C. A., Sec. 160 (e).
[2] 5 U. S. C. A., Sec. 1009(e).

The Court could hardly conclude otherwise. As the Petition shows, every aspect of the picketing was limited to the primary dispute. The pickets appealed only to the other employees of the same employer. The location of the pickets, the wording of the signs, and the supplementary oral and written communications all were true to the primary purpose. (Petition, pp. 5, 6). And in addition to the facts stated in the petition, there were others which the Court below noted.

Seventy per cent or more of the primary employer's business is the installation of materials which it sells (B.A. 6, 18). The Otis Massey craft employees who install the materials seldom go to the warehouse, but generally report driectly to the installation job sites (B.A. 6).

The work of the four striking truck driver-warehousemen is not confined to the warehouse; all of them also deliver building materials to Otis Massey's craft employees at the construction projects (B.A. 20-21). At these job sites, they unload and stack the materials for the craft workers, and also replenish the materials from time to time (B.A. 20).[3] Thus, when they picketed the warehouse and the construction sites where Otis Massey's other employees were working in the normal course of the employer's business (B.A. 36, 47), the strikers were picketing at both terminals of their to and fro trucking work (B.A. 19, 22).

At the job sites, the pickets appeared after the men went to work, never before (B.A. 42, 54), and carefully sta-

[3] Contrary to the Petition's recitation (p. 5) that they "occasionally" delivered materials to the construction projects, the court below found: "The record shows that the truck driver-warehousemen, during the period here material, did make a number of deliveries to the Otis Massey job sites. . . ." which Government counsel conceded at the trial was the regular practice (Appendix A of Petition, p. 27, footnote 13).

tioned themselves as close as possible to the place where Otis Massey was engaged in its normal business (B.A. 36, 46). Not all entrances, only those near Otis Massey's work, were picketed (B.A. 47-48).

Based upon this record, Respondents also attacked the Board's conclusions (if they are fact findings) that: (1) the "situs" of the dispute was limited to the warehouse; and (2) picketing at the warehouse was "adequate."

The court below likewise recognized that the Board could not under the guise of fact finding fix the "situs" of a dispute at only one of a primary employer's numerous business activities and noted that Government counsel conceded at the trial that the truck driver-warehousemen from time to time make deliveries to the job sites during the course of the work by employees of Otis Massey (Appendix A of Petition, p. 27); and the Court further noted on the question of the "adequacy" of the picketing that the record showed that the other employees of Otis Massey almost never went to the warehouse, so that picketing at the warehouse would be virtually futile as to such employees (Appendix A of Petition, p. 27). And in this connection, we point out that the record does not contain any testimony which would support the inference that the picketing at the warehouse was adequate from the standpoint of the union. To the contrary, where only four employees go on strike it is obvious that they can be easily replaced and that the strike would certainly fail unless the other employees of the same employer would come to the assistance of the strikers by declining to do the installation work until the strike was settled.

Reasons for Denial of the Writ

1. The meticulous opinion of the Court of Appeals demonstrates that the position of the Board has no merit as applied to the facts of this case. The denial of enforcement was clearly correct.

The difficulty with the Board's position is that Congress, in enacting Section 8 (b) (4) (A), drew the line in terms of an unlawful *objective*. On the other hand the Board has drawn an entirely different line, namely: a geographical "situs" for the labor dispute and an evaluated "adequacy" of the picketing.

As the record shows, the "situs" here declared by the Board is not only unrealistic in fact and without warrant in the statute, but as here applied it effectively destroys important rights conferred by Section 7 of the statute. As to the "adequacy" concept, it is not only contrary to the facts and unsupported by evidence, but is an excursion by the Board into a field which Congress did not entrust to the Board.

Section 7 of the Labor Management Relations Act of 1947 is a verbatim re-enactment of the original Section 7 of the Wagner Act except only that there is added the right to refrain from the guaranteed concerted activities.[4]

The new Section 8 (b) (4) (A) forbids the inducement or encouragement of strike action by neutral employees "where an object thereof" is to force the neutral employer to cease doing business with any other person.

A new Section 13[5] provides:

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[4] See Appendix A, p. 15, **infra.**

[5] 29 U. S. C. A., Sec. 163.

> "Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

In the four leading cases decided June 4, 1951[6] the Supreme Court has settled that Section 7 rights of concerted activity for mutual aid and protection remain intact as between the *primary* parties to a labor dispute.

> "By § 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specially provided for' in the Act." *International Rice Mill* case, *supra*, 341 U.S. at 673, 71 S. Ct. at 965.

The word "situs" does not appear in the statute. Nowhere is there "specially provided for" a power in the Board to fix a "situs" at only one location of the primary employer's normal business operations or to insulate a few employees from their co-employees. Section 7 which guarantees the right of "concerted activities for * * * mutual aid or protection" has long been held to include the right to strike and picket in support of economic demands.

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[6] **N.L.R.B. v. International Rice Milling Co.**, 341 U.S. 665, 71 S. Ct. 961, 95 L. Ed. 1277 (1951);
N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 (1951);
International Brotherhood of Electrical Workers, Local 501, AFL v. N.L.R.B., 341 U.S. 694, 71 S. Ct. 954, 95 L. Ed. 1299 (1951); and
United Brotherhood of Carpenters and Joiners of America, AFL v. N.L.R.B., 341 U.S. 707, 71 S. Ct. 966, 95 L. Ed. 1309 (1951).

N. L. R. B. v. Mackay Radio, etc., 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938), and *Collins Baking Co. v. N. L. R. B.*, 193 F. 2d 483 (C.A. 5, 1951). Section 7 likewise includes the right of fellow employees of the same employer who are not directly involved in the dispute to join the striking workers, to lend sympathy and support to their cause, and to refuse to cross their picket line. *Carter Carburetor Corp. v. N. L. R. B.*, 140 F. 2d 714, 718 (C.A. 8, 1944); *N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503 (C.A. 2, 1942); and *West Coast Casket Co.*, 97 N. L. R. B. 820, 823. Therefore, the strikers had a statutory right to appeal, by picketing, to the other employees of Otis Massey to aid the strike by declining to do the employer's installation work until the bargaining issues should be settled.

Therefore, where the unchallenged conclusions of fact by the Court of Appeals show that the complained-of picketing was limited in fact to Section 7 primary activities, and where there is a total absence of any evidence that there existed the unlawful objective described in Section 8(b)(4)(A), the application of the situs theory is the destruction of Section 7 rights which is not "specifically provided for" as required by Section 13. The Court of Appeals was, therefore, precisely correct when it held (Appendix A of Petition, p. 25-27) that a violation of 8 (b) (4) must be based:

> " . . . upon substantial evidence that the unlawful objective denounced by the statute actually existed, rather than upon the inferentially suggested theory that this ultimate and controlling statutory inquiry may be *effectually supplanted* merely by Board findings that the real 'situs' of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be 'adequately' pub-

licized with impunity under the Act, and thereby inferring from such findings, as here, that the unlawful objective exists. Indeed, such a theory would, we think, elevate the Board formulated 'criteria' by judicial fiat to a vantage point from which it could, in effect, circumvent the statute, for in this type instance it would substitute Board inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute. . . .

* * *

" . . . we conclude that no warrant exists either in the language of the statute or the authorities cited which would justify the adoption and approval of its 'situs' theory to an extent inconsistent with other provisions of the Act, or for empowering the Board, under guise of fact-finding, to fix the 'situs' of a dispute at only one of a primary employer's numerous business activities, thereby isolating other employees of that same primary employer from exercising their statutory right under Section 7 to engage in mutual aid and protection and make common cause with their co-workers. See *Carter Carburetor Corp. v. N. L. R. B.*, 8th Cir., 140 F. 2d 714, 718; *N. L. R. B. v. Peter C. K. Swiss Choc. Co.*, 2nd Cir., 130 F. 2d 503, 505; *N. L. R. B. v. J. I. Case Co., etc.*, 8th Cir., 198 F. 2d 919, 922." (Emphasis Added; Footnotes Omitted)

The statutory test of unlawfulness is the objective under Section 8 (b) (4) (A) which prohibits the inducement of employees of neutral employers to strike "where an object thereof" is to force the neutral employer to cease doing business with any other person. Perhaps the most often repeated Supreme Court summary of this section has been the reference to this objective:

"At the same time that §§ 7 and 13 safeguard collective bargaining, concerted activities and strikes between the primary parties to a labor dispute, § 8(b)(4) restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott some one else." *Denver* case, *supra*, 741 U.S. at 687, 71 S. Ct. at 951.

"We now reach the merits. They require a study of the objectives of the strike and a determination whether the strike came within the definition of an unfair labor practice stated in § 8(b)(4)(A)." *Denver* case, *supra*, 341 U.S. at 685, 71 S. Ct. at 950.

"We must first determine whether the strike in this case had a proscribed object." *Denver* case, 341 U.S. at 687, 71 S. Ct. at 951.

". . . 'It was the *objective* of the union's secondary activities . . . and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision. . . .'" *Electrical Workers* case, 341 U.S. at 704, 71 S. Ct. at 959.

"It is the objective of union encouragement that is proscribed by that section, rather than the means adopted to make it felt." *International Rice Mill* case, 341 U.S. at 672, 71 S. Ct. at 965.

Accordingly, it is clear that the significance of the Board's position in this case is to destroy the ultimate and controlling statutory inquiry and supplant it by the "situs" definition to an extent which is inconsistent with Sections 7 and 13 of the Act. Under the Board's theory the strikers are automatically condemned in advance to the loss of an important segment of their Section 7 rights. For under this theory it does not matter how innocent or lawful may be their purpose and objective nor how true may be their picketing to

their purpose; if they do not conform to the location decreed by the Board, they are *ipso facto* in violation of 8(b)(4)(A). And contrary to the statutory scheme, the parties' freedom to pursue their Section 7 rights is restricted by the Board's notion of what is "adequate" in their economic contest. We submit that the Court of Appeals was indeed duty bound to deny enforcement of this order.

2. In accordance with the Supreme Court's observation in an earlier secondary boycott case that "the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to [redacted]". *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 (1951), the court below citing that case (Appendix to Petition, p. 24) acknowledged the Board's "commendable effort to balance 'the dual Congressional objectives of preserving the right of labor organizations to bring pressures to bear on offending employers in primary disputes and of shielding unoffending employers and others from pressures in controversies not their own' " by devising in the *Moore Dry Dock Company* case, 92 NLRB 547, 549, "certain evidentiary tests to aid in determining the ultimate issue of whether common situs picketing is primary and lawful or secondary and unlawful."

And the court below emphasized that " . . . our view does not compel rejection of all the *Moore Dry Dock* criteria, as such, when properly applied . . ." (Appendix to Petition, p. 26). The Court's holding is limited to a rejection of the situs theory where it was applied "to an extent inconsistent with other provisions of the Act", thereby destroying Section 7 rights. In essence the Court declined to accept the Board's definition of "situs" as a substitute for a clear and convincing record that the prohibited secondary object was

not present. In other words the Board's mechanical approach led to a conclusion obviously at war with truth and fact." "That the picketing here enjoined was aimed only at the primary employer, Otis Massey, and wholly without the proscribed secondary object, could hardly be disputed under this record." (Appendix to Petition, p. 28.)

3. The decision below is in harmony with the view of the other Courts of Appeals which have dealt with the problem. While the Second Circuit referred to the *Moore Dry Dock* criteria as "a sound interpretation of the Act" in *N. L. R. B. v. Service Trade Chauffeurs, etc., Local 145*, 191 F. 2d 65 (C.A. 2, 1951) the language of that court clearly indicates that it would decide the present case in exactly the same way.

In remanding that case to the Board, the Second Circuit noted the legality of primary picketing "conducted at a place *where the primary employer does business* (Emphasis added), "and accordingly the Court found an 8(b)(4) violation because of picketing at a warehouse where "no trucks operated by the primary employer were present at the warehouse, *nor were any of its employees there engaged in the primary employer's business* (Emphasis added.)"

And in *Piezonki d/b/a Stover Steel Service v. N. L. R. B.*, 219 F. 2d 879, 882-3 (C.A. 4, 1955) the Fourth Circuit found an 8(b)(4) violation because "the picketing did not disclose clearly that the dispute was with the primary employer", the Court at the same time indicating that there would be no violation if the picketing were "directed at obtaining relief from the person picketed" as is the case here.

The same is true of *N. L. R. B. v. Chauffeurs, etc., Local No. 135*, 212 F. 2d 216, 219 (C.A. 7, 1954) and *N. L. R. B.*

v. Local Union 55, Carpenters, 218 F. 2d 226 (C.A. 10, 1954); in both of which cases the courts indicated clearly that picketing properly confined to the lawful primary purpose would not violate 8(b)(4)(A).

Thus, all of the courts which have considered the problem have come to the same harmonious conclusion which is in keeping with the statutory scheme and the Supreme Court's pronouncements.

Although the Board may be striving to balance the dual Congressional objectives "in a practical manner", there is no substantial basis in the statute for the Board to claim the right to obscure plain facts and amputate valuable and needed statutory rights in the interest of a mechanical rule which goes awry of the truth and fact of this case. Nor is there merit to a possible latent feeling that Section 7 rights may properly be sacrificed in the interest of "practical" balancing because Congress has established the public policy in another way. "For the policy of the National Labor Relations Act is not to condemn all picketing but only that ascertained by its prescribed process to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner v. Teamsters Union,* 74 S. Ct. 161, 346 U.S. 485, 499, 98 L. Ed. 228 (1954).

WHEREFORE, Respondents pray that the Petition for Certiorari be denied.

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Certificate of Service

Copies of the foregoing reply have been deposited in a United States mail box, with air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D. C., and to Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington 25, D. C.

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APPENDIX A

Section 7 of the National Labor Relations Act, as amended, 29 U. S. C. A., Section 157 is reproduced below. The new language added in 1947 is italicized. The remainder is the same as the same section of the Wagner Act:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).*"

Section 13 of the National Labor Relations Act, as amended, 29 U. S. C. A. 163, reads as follows:

> "Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."